IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 11.12.2007

Coram ;

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN
and
THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

Original Side Appeal No.162 of 2004

Central Warehousing Corporation,
No.4, North Avenue, Srinagar Colony,
Saidapet, Chennai 600 015, represented
by its Managing Director — Appellant

v.

1. M/s. A.S.A. Transport by its
proprietor S.Ameer Basha,
J-136, M.M.D.A. Colony,
Arumbakkam, Chennai 600 106.

2. S.P.Singha,
Sole Arbitrator,
Q-505 Anupam Apartments,
East Arjun Nagar, Shahdara,
Delhi 110 032. — Respondents

Original Side Appeal is filed under Order XXXVI Rule 1 of the Original Side Rules read with clause 15 of the Letters Patent against the order dated 15.10.2003 passed by a learned single Judge of this Court in O.P. No.615 of 2002.

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For appellant : Mr.V.Raghavachari, for
Mr.A.J.Abdul Razack

For respondent 1 : Mr.B.Diwakar

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JUDGMENT

K.RAVIRAJA PANDIAN, J.

In this appeal, the Central Warehousing Corporation, the appellant herein has put in issue the order of a learned single Judge of this Court dated 15.10.2003 made in O.P. No.615 of 2002 setting aside the arbitration award dated 17.10.2001 passed by the second respondent herein and directed the appellant to appoint an arbitrator, who is available at Chennai within four weeks from the date of receipt of a copy of the order to conduct the arbitration proceedings in Chennai in accordance with law and to pass a speaking order within four months from the date of entering into the reference. In the award, which was impugned in the O.P., the arbitrator has awarded a sum of Rs.4,62,912/- towards counter claims in favour of the appellant herein with the direction to adjust the security deposit furnished in a sum of Rs.1,00,000/- by the first respondent. The balance of Rs.3,62,912/- was directed to be paid by the first respondent, in addition to the arbitration expenses. In the arbitration award, the arbitrator has considered the first claim alone and rejected the same as not sustainable with reference to the terms contained in the contract, but did not even consider the rest of the six claims on the ground that those claims did not come within the ambit of reference of arbitration.

2. The material facts of the case required to be stated, go as follows :

The first respondent entered into an agreement on 27.07.1998 for transportation for fertilizer and foodgrain from Tanjore Railway-shed to the appellant-warehouse at Thanjavur for a period of two years with the appellant. As the performance of the respondent contractor was not in accordance with the agreed terms, the appellant terminated the contract on 22.03.2000. The first respondent, questioning the order of termination, had filed a writ petition No.5343 of 2000 seeking for the relief to quash the order of termination dated 22.03.2000 and consequently direct the appellant to appoint an arbitrator as provided under clause XIX of the agreement to sort out the dispute arising out of the contract between the appellant and the first respondent. On receipt of the notice from the Court in the above said writ petition, the appellant referred the dispute to the second respondent arbitrator by his letter dated 03.10.2000. In view of the referral of the dispute for arbitration, the writ petition was stated to be disposed of as nothing remains to be adjudicated, upon hearing the parties.

3. In the affidavit filed in support of the writ petition as aforesaid, the first respondent has averred that he was not able to transport the goods to the appellant warehouse through the shorter route because of heavy traffic congestion and was forced to choose only the longer route, which was provided in the agreement. Having regard to the longer distance covered by the first respondent, the first respondent

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claimed a sum of Rs.15,76,913/- for the period from 01.03.1999 to 15.01.2000. The appellant has approved Rs.4,11,358/- which correspond to the shorter route and deducted Rs.11,65,555/-, which was not acceptable to the first respondent. Taking the above said averment as the basis for the dispute, the appellant made a reference to the second respondent to adjudicate the dispute that has arisen between the parties in respect of the agreement and relating to the claim of the respondent contractor amounting to Rs.15.77 lakhs (approx) as per the affidavit dated 27.03.2000 filed in the writ petition. Pursuant to the same, the second respondent, by letter dated 23.10.2000, called upon the first respondent to file a claim statement amounting Rs.15.77 lakhs (approx) along with supporting documents by 25.11.2000. In the said letter it was also informed that the venue of hearing would be at Delhi. In response to the application of the respondent dated 07.11.2000 that the arbitrator should cover all the disputes touching upon the contract, the arbitrator by his letter dated 20.11.2000 informed that his authority was confined to the existing terms of reference and it could not be exceeded. The arbitrator further informed that the arbitration can be held at Chennai on the condition of the parties bearing his Air travel and boarding and lodging expenses. None of the parties responded to the suggestion of the arbitrator to have the arbitration proceedings at Chennai.

4. The claimant/respondent filed a claim statement claiming a sum of Rs.81,44,258/- under seven heads, the first of which was in a sum of Rs.16,41,519/- towards remuneration payable for longer distance route covered by the first respondent. A sum of Rs.38,00,000/- was claimed towards compensation for damages/loss, etc., caused to the first respondent as a result of the termination of the contract as claim No.2. Under claim No.3 a sum of Rs.4,00,000/- has been claimed towards non issuance of work-slips which prevented the respondent from claiming the bills. Under claim No.4 a sum of Rs.5,00,000/- was claimed towards non follow up of terms and conditions of the contract and a sum of Rs.6,02,739/- was claimed as with-held amount towards DC/WC under claim No.5. Rs.7.00 lakhs was claimed under claim No.6 towards non payment of bills. Claim No.7 for non payment of remuneration for handling jumbo rakes was made for a sum of Rs.5,00,000/-. Thus, a total sum of Rs.81,44,258/- was claimed with the interest at the rate of 24%.

5. The appellant herein filed a counter claim. That counter claim was duly forwarded to the first respondent. The first respondent filed his additional claim petition and filed written arguments on 07.08.2001 in which he has stated that in view of his ill-health and the distance and the time required for travel to Delhi, the arbitrator was requested to consider the written arguments with reference to the documents produced by the claimant in support of the claims and pass orders.

6. On that basis, the arbitrator passed an award on 17.10.2001. The first claim of Rs.16,41,519/- claimed by the first respondent towards transport cost in the longer route was rejected for the reason that the shorter route was available and open to the public and there was no

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restriction to use that road. The said fact was substantiated by the letter furnished by the Superintendent of Police, Thanjavur and that of the District Collector. The committee constituted by the respondent for the purpose of verifying/certifying the route in which the stocks were moved from Thanjavur Railway-shed to the central warehouse on 08.12.1999 and 09.12.1999 also did not support the claim. The said fact has also been confirmed by the Thanjavur lorry owners welfare association. The arbitrator further held that the termination of the contract by the appellant was due to non performance of the contract by the first respondent, as agreed and on that score, he held that the first respondent has to reimburse the counter claims made by the appellant towards engaging another contractor for transportation at the risk and cost of the respondent; business loss; labour charges; damage to staff, demurrage charges; shortage of gunny bags and thus allowed all the counter claims as aforesaid.

7. The other claims made by the first respondent has not been taken into consideration by the arbitrator for the reason that the authority to adjudicate the dispute was limited to the first claim made by the respondent alone. The other claims were outside the purview of the arbitral reference.

8. Aggrieved by the award made by the arbitrator, the first respondent herein filed an application under Section 32(2)(v) of the Arbitration and Conciliation Act, 1996 in O.P.No.615 of 2002. The learned single Judge after taking into consideration of the contentions raised by the parties, has recorded a finding to the effect that the appellant was not correct in referring the first claim alone for arbitration, when there were several claims made by the respondent. The parties could not have their dispute resolved in a piece-meal manner. The action of the appellant could not be regarded as fair and reasonable in driving the first respondent from pillar to post for adjudication of its other disputes. In respect of the other objection of holding the arbitration proceedings at Delhi, the learned single Judge after referring to Section 20(2) of the Arbitration and Conciliation Ac;t, 1996 held that as per the provisions, the convenience of the party was more important for the conduct of the arbitration proceedings. As the dispute arose at Madras and all the parties and witnesses were available only at Madras, and further the inability on the part of the respondent were totally disregarded by the arbitrator in holding the arbitration proceedings at Delhi, when the respondent has been expressing his inability from the beginning to participate in the arbitration proceedings at Delhi. The proceedings should have been conducted in all fairness at Chennai. On that reasoning, the learned single Judge set aside the award and directed the first respondent to appoint an arbitrator, who is available at Chennai, so as to enable him to have the proceedings at Chennai. The said order is assailed in this appeal.

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9. Learned counsel appearing for the appellant has submitted that the arbitrator is correct in his view that the reference dated 03.10.2000 is only in respect of the first claim of the first respondent amounting to Rs.15.77 lakhs towards transportation cost. The seven claims made by the respondent barring the first claim are outside the scope of the reference. The reasoning of the learned single Judge that the appellant has not referred the entire dispute for arbitration cannot be a reason to set aside the award under Section 34 of the Act. He further emphasized that the learned single Judge has only given reason against the appellant in not referring all the disputes to the arbitrator, but did not give any reasons as to how the award was wrong with reference to Section 34 of the Act. In respect of the other points in holding the arbitration proceedings at Delhi, learned counsel contended that in spite of the request made to the parties to agree to conduct the arbitration proceedings at Chennai on certain terms, the respondent has not accepted the same, but however impliedly assumed to the proceedings at Delhi by requesting the arbitrator to consider his written arguments and pass award by his letters. In such circumstances of the case, the learned single Judge is not correct in setting aside the award on the second ground also.

10. Per contra, learned counsel appearing for the first respondent submitted that the arbitrator has totally misdirected himself in restricting the scope of the reference to the claim towards transportation only. The reasoning that the affidavit filed in support of the writ petition is specific only about the transportation charges, is not correct. In paragraph No.6 of the affidavit, it was made clear that the respondent was not traversing too much on the facts and circumstances leading to the dispute and reserved its right to place all those facts before the arbitrator when appointed. Those averments have been totally lost sight of. The appellant was not correct in referring the dispute in respect of transportation alone when several disputes touching upon the contract were made by the petitioner.

11. We heard the arguments of the learned counsel on either side and perused the materials on record.

12. The arbitration clause contained in the contract read as follows:

> "XIX ARBITRATION:
>
> a) All disputes and differences arising out of or in anyway touching or concerning this agreement whatsoever (except as to any matter the decision of which is expressly provided for in the contract) shall be referred to the sole Arbitration of any person appointed by the Managing Director, Central Warehousing Corporation, New Delhi. It will be of no objection to any such appointment that the person appointed is an employee of the Corporation, that he had to deal with the matter to which views on all or any of the matter in dispute or difference. The award of such arbitrator shall be final and binding on the parties to

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this contract. It is a term of this contract that in the event of such Arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, the Central Warehousing Corporation at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as Arbitrator in accordance with the terms of this contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by the Managing Director, Central Warehousing Corporation, New Delhi as aforesaid should act as Arbitrator and if for any reason that is not possible, the matter is not to be referred to Arbitration at all. The Arbitrator shall give reasons for his award.

b) Provided further that any demand for arbitration in respect of any claim(s) of the contractors, under the contract, shall be in writing and made within one year of the date of termination or completion (expiry of the period) of the contract and where this provision is not complied with the claim(s) of the contractors shall be deemed, to have been waived and absolutely barred and the Corporation shall be discharged and released of liabilities under the contract.

c) The Venue of Arbitration shall be such place as may be fixed by the Arbitrator in his sole discretion.

d) The Arbitral Proceedings in respect of dispute shall commence on the date on which the Arbitrator call upon the parties to file their claim and defence statement.

e) The work under the contract shall, if reasonably possible continue during the arbitration proceedings and no payment due or payable to the contractor shall be withheld on account of such proceedings.

f) The cost of arbitration shall be borne by the parties as per the decision of the Arbitrator.

g) The Arbitrator shall give separate award in respect of each dispute or difference referred to him.

h) Subject as aforesaid the Arbitration & Conciliation Act 1996 shall apply to the Arbitration proceedings under this clause."

13. The main controversy in this case is whether the reference is restricted only in respect of claim of the respondent-contractor amounting to Rs.15.77 lakhs towards transportation cost alone as conceived or understood by the arbitrator and the further contention of the appellant that the arbitrator was right in his view that only the transportation claim as aforesaid was the subject matter of reference and the other claims made by the respondent cannot be the subject matter of reference is correct or not. In order to appreciate that point, we are of the view that it is necessary to extract the reference order and it read as under :

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"CENTRAL WAREHOUSING CORPORATION
(A GOVT.OF INDIA UNDERTAKING)

NO.CWC-CD/IX-THANJAVUR-2000-2001 Dated: 3.10.2000.

APPOINTMENT OF ARBITRATOR AS PER CLAUSE XIX OF THE TENDER DOCUMENT IN THE MATTER OF DISPUTE ARISEN BETWEEN CENTRAL WAREHOUSING CORPORATION AND M/S.A.S.A. TRANSPORT EX H& T CONTRACTOR FOR THE WORK OF H & T CONTRACT OF FOODGRAINS/FERTILIZERS AT CENTRAL WAREHOUSE, THANJAVUR FOR THE PERIOD 6.7.98 TO 5.7.2000 @ 432%ASOR

Whereas by an agreement dated 27.7.98 entered into between Central Warehousing Corporation and M/s.A.S.A.Transport, Ex Contractor, a binding and concluding contract came into existence between said parties in response to tender enquiry made and opened on 20.3.98.

And whereas, it was agreed inter alia that in case any dispute arises between the parties in any way concerning terms and conditions incorporated in the said tender document, the same should be referred to the sole Arbitration of any person appointed by the Managing Director of the Corporation.

And whereas a dispute has arisen between the said parties relating to the claim of Ex H&T contractor, amounting to RS.15.77 lakhs (approximately) as per affidavit dt.27.3.2000 filed in the High Court at Madras CWC.

Now, therefore, I, N.K.Choubey, Managing Director, Central Warehousing Corporation (A Govt. of India Undertaking), 4/1, Siri Institutional Area, Hauz Khas, New Delhi-16 appoint Shri.S.P.Singha, Ex IRAS & Ex Adiviser Railway Board to adjudicate upon and to give his speaking Award in the matter of dispute relating to claim of M/s.A.S.A.Transport and counter claim of CWC, if any.

Sd/ (N.K.CHOUBEY)
MANAGING DIRECTOR."

14. As per the Head Note, the arbitrator was appointed as per Clause XIX of the Tender Document in respect of the dispute arising between the appellant and the first respondent for the work of H& T contract of Foodgrains/Fertilizers at Central Warehouse, Thanjavur for the period 06.07.1998 to 05.07.2000 at 432%ASOR. In the first paragraph, the agreement dated 27.07.1998 entered into between the appellant and the respondent has been referred to as binding between the parties. In the second paragraph, it was stated that in case of any dispute arises between the parties in any way concerning terms and conditions incorporated in the tender document, the same should be referred to sole arbitrator appointed by the Managing Director of the appellant

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Corporation. In the third paragraph, it was stated that a dispute has arisen between the said parties relating to the claim of Ex H&T contractor, amounting to Rs.15.77 lakhs as per affidavit dated 27.03.2000. By so stating, the appellant Corporation has appointed the second respondent as an arbitrator to adjudicate upon and to give his speaking award in the matter of dispute relating to claim of the respondent and counter claim of the appellant, if any.

15. In our view, the first three paragraphs in the order dated 03.10.2000 cannot be regarded as the terms of reference. They are only introductory or prefactory or qualifying statements stating the reason for making the reference for arbitration. It is not the essential part of operating portion of the reference. To understand the paragraphs, we will have to understand what is the meaning of the phrase "whereas" used in the above three paragraphs.

In Black's Law Dictionary - 5th Edition, the word "whereas" has been defined thus:

> "When in fact.
> A 'whereas' clause of a contract is but an introductory or prefatory statement meaning 'considering that' or 'that being the case' and is not essential part of the operating portion of the contract."

In Black's Law Dictionary - 8th Edition, the word "whereas" has been defined thus:

> "1. while by contrast; although
> Mcwilliam was stopped at 10.08 pm wearing a green hat whereas the assailant had been identified at 10.04 pm wearing a black hat.
>
> 2. Given the fact that; since
> Whereas, the parties have found that their 1994 agreement did not adequately address the incidental expenses .... and whereas the parties have now decided in an equitable sharing of those expenses.....; Now therefore, the parties agree to amend the 1994 agreement as follows ...
>
> In sense, 'whereas' is used to introduce contractual recitals and the like, but modern drafters increasingly prefer a simple heading such as 'recitals' or 'preamble' and in that way avoid the legalistic 'whereas'

In Webster's Collegiate Thesaurus, 1976 Edn., the word "whereas" has been defined thus:

> "Because, as, as long as, 'cause, considering for, inasmuch as, now, seeing, since.
> Syn : Though, albeit, although, howbeit, much as, when, while

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In Advanced Law Lexicon – Ramanatha Aiyer, 3rd Edn., the word "whereas" has been defined thus:

> "A word which implies a recital of past fact or facts. In view of consideration of the fact that, for as much as; in as much as; introducing a statement of fact in contrast or opposition to that expressed by the principal clause (preamble T.P. Act 4/1882)

In Wharton's Law Lexicon, the word "whereas" has been defined thus:

> "A word which implies a recital of a fact. The word 'whereas' when it renders the deed senseless or repugnant, may be struck out as impertinent, and shall not vitiate a deed in other respects sensible.

In Webster's 3rd International Dictionary, the word "whereas" has been defined thus:

> "Considering that : in view of the fact that , since used to introduce a preamble (as to a law or contract) that is the basis of a following declaration, affirmation, command, or request.
>
> When in fact; while on the contrary;
>
> the case being in truth that – used to introduce a statement in opposition or contrast to a preceding or sometimes following statement (was spending practically all of his time on the inside dealing with things.
>
> An introductory statement of a formal or legal document.
>
> A conditional or qualifying statement.
>
> Webster's Encyclopedic Unabridged Dictionary of the English Language.
>
> 1. While on the contrary – one came promptly whereas the others hung back.
>
> 2. it being the case that, or considering that (used in formal preamble)
>
> 3. qualifying or introductory statement, esp., one having 'whereas' as the first word : To read the whereas as in the will

In American Heritage Dictionary of the English language, the word "whereas" has been defined thus:

> "An introductory statement to a formal document; a preamble. A conditional statement."

From the above meaning assigned to the word "whereas", in the reputed dictionaries, which are taken in aid for meaning and interpretation of words, the one and only conclusion that could be arrived is that the paragraphs No.1 to 3 of the order dated 03.10.2000 are only an introductory or prefatory statement of facts on the basis of which or on the case being so, the dispute has been referred to arbitrator. The three clauses, which starts with the word "whereas", cannot be regarded as an essential part or an integral part of the

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operative portion of the reference. The operative portion of the reference is the last paragraph, as extracted above, which would only reveal that the Managing Director of the appellant Corporation one N.K.Choubey appointed Sri S.P.Singha, the second respondent herein to adjudicate upon and give his speaking award in the matter of dispute relating to the claim of the respondent and the counter claim of the appellant, if any. In the absence of any restriction in the essential part of the operative portion of the reference, in the sense, in the operative portion, the dispute relating to the claim of the respondent has not been restricted to Rs.15.77 lakhs, and the matter relating to the dispute of claim by the respondent would only mean all the claims made by the respondent touching upon the H & T contract entered into between the parties. That would include all claims made by the respondent in his claim statement and all counter claims made by the appellant. So, the non consideration of claims 2 to 7 made by the first respondent before the arbitrator on the ground that the arbitration reference is not covering the issue goes to the root of the matter and thus, the arbitrator misconducted and misdirected himself by restricting the scope of reference to the first claim alone. As such, the award is liable to be set aside under section 34 of the Act.

16. In respect of the other point - venue of the arbitration proceedings, it is not as if the appellant Corporation is having office or officers only at Delhi. When the dispute has arisen at Chennai, there is no valid or acceptable reason for appointment of an arbitrator at Delhi directing the contractor, the respondent herein to appear before him at Delhi or bear the travelling and boarding expenses of the arbitrator, who is stationed at Delhi. It is not only against section 20(1) of the Act, but against the very purpose of the enactment. The cause of action arose at Chennai. The parties as well as the witness are at Chennai. The appellant is also having office and officers to adjudicate the dispute at Chennai. The appellant would have very well appointed an arbitrator who is stationed at Chennai. That would have given a real opportunity as intended in law to the respondent to have his dispute adjudicated In this case, the award passed is one against the last limb of Section 34(2)(a)(iii) of the Act. Hence, the award is liable to be set aside on that ground also.

17. Though we are not in a position to concur with the reasoning of the learned single Judge, we are in complete agreement with the ultimate order of the learned single Judge in setting aside the award. However, the further direction given by the learned single Judge directing the appellant to appoint an arbitrator at Chennai and for conducting the arbitration are to be set aside as it cannot be given as an order of the Court. Useful reference can be had to the judgment of the Supreme Court in the case of Mcdermott International Inc. v. Burn Standard co. Ltd., (2006) 11 SCC 181, wherein it was held that the 1996 Act makes provisions for supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. It can only quash the award leaving

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the parties free to begin the arbitration again if it is desired. Hence, in an application taken out under section 34 of the Act, the Court can set aside the award leaving the parties free to begin the arbitration again if it is desired.

18. Therefore, the order of the learned single judge setting aside the award is confirmed for the reasons given by us. However, the other observations of the learned single Judge are set aside. The issue is left open to the parties to proceed further. The appeal is disposed of in the above terms. However, there is no order as to costs. The connected miscellaneous petition is closed.

mf/usk

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